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Regulation of Commerce under the Federal Constitution. By THOMAS H. CALVERT. (Northport, N. Y.: Edmond Thompson Company. 1907. Pp. xiv, 380.)

The series of studies in constitutional law in which the present volume appears is an attempt on the coöperative plan to supply the need of a general treatment of American constitutional law. Treatises on special phases of this subject are fairly numerous but the student can turn to no work which adequately covers the whole field. With all the disadvantages incident to the coöperative method the effort to fill in the gap in legal literature will be generally welcomed.

The work under consideration covers what are termed the commerce clauses of the Federal Constitution. A reasonably wide interpretation of the title has been taken and we find that the author is concerned not only with article 1 of section 8, commonly known as the interstate commerce clause, but also with sections 9 and 10 of the same article, relating to imports, exports and duties, as far as they incidentally touch upon commerce. He does not take up the statutes which have been enacted under the power over interstate commerce and consequently the extended discussion of the interstate commerce act, usual in treatments of this subject, is omitted.

The book is divided into three parts; the first of which takes up the general powers of congress and the States; the second, the various subjects of regulation, and the third, State taxation as affecting commerce. This arrangement seems to be a thoroughly practical one, although it involves a certain duplication of treatment between parts 1 and 2; such duplication would, however, probably be necessary in almost any arrangement which could be devised. Mr. Calvert has largely been guided by the decisions in his division of the space allotted but seems to have preserved the balance so that the treatment is in this respect fairly satisfactory.

In the first requisite of a law book, the accurate statement of the decision in each case, no fault can be found with the work. One who uses it can be reasonably sure that the point of each case has been grasped and stated, either in the words of the judge or of the author, in an accurate manner.

A fault which this book has in common with all of the works published by the Edward Thompson Company is the failure to give anything but the official citation for each case. This is not so serious in the case of the supreme court citations for practically every law library has the

official edition of the supreme court reports. The labor of examining the cases from the State reports is, however, materially increased by the omission of references to the *National Reporter* system, which is the place which the ordinary investigator has at hand for the examination of State cases. It is unfortunate that the commercial rivalry between two publishing houses should impose this additional burden upon the legal profession.

In his failure adequately to state the general principles which underlie the individual decisions the author shows his principal weakness. He is on the whole content to rest his treatment of a subject with the statement of the result reached in each case. Where he does summarize the result of a series of cases he is apt to take his summary from some decision. The formulation of a principle from cases which are not entirely in harmony and the pointing out of the best considered doctrine will be sought in vain.

This failure of many portions of the book to get beyond the digest stage largely diminishes the scientific value of the work. The lawyer is frequently satisfied with a satisfactory index to the cases, making his own selection of those applicable to the case in hand. The political scientist asks rather for a discussion of fundamental principles. The lack of such a discussion will render the work unsatisfactory to him.

An undue insistence upon the relation of the police power to interstate commerce is probably the result of the method employed. The State police power does not in any material way concern the student of interstate commerce. It is true that many of the decisions of the supreme court concerning interstate commerce enter into fairly elaborate discussions of the police power, and Mr. Calvert has simply followed these decisions. His statement of the individual cases is accordingly accurate, but the lack of a general view of the subject gives a somewhat false impression.

This assertion that the police power is not material to a discussion of interstate commerce may possibly be challenged. A careful examination of the various cases will, however, show that the discussions concerning the police power are mere dicta. This is evident when we consider the points involved in the cases concerning the power over interstate commerce. These questions may be resolved into two: Does the act in question affect interstate commerce, and if so, does it do so directly so as to interfere with the exclusive jurisdiction of congress or does it do so only indirectly so that the State can act in the absence of congressional regulation? The answer to the first of these questions obviously

does not involve a consideration of the police power. The answer to the second might involve the police power if such view of the question had been taken by the supreme court. It is true that many cases seem to indicate that a State acting under the police power may interfere with interstate commerce unless congress has acted on the subject. This principle is not borne out, however, by various other cases. The point may be illustrated by a comparison of certain of the decisions. In *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, the oleomargarine law of Pennsylvania was declared inoperative when applied to interstate shipments, although there had been no action of congress upon the subject, while in *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, this same law had been declared a proper exercise of the police power of the State in a case not involving interstate commerce. In *Leisy v. Hardin*, 135, U. S. 100, 10 Sup. Ct. Rep. 681, the Iowa prohibitory law was declared unconstitutional when applied to interstate shipments of liquor in the original package, although the prohibitory law of Kansas had been upheld in intrastate commerce as a legitimate exercise of the police power, in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 623. The statutes of the various southern States requiring separate accommodations for different races are an exercise of the police power as is seen in *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. Rep. 1138. If applied to interstate commerce they would be invalid; *Hall v. DeCuir*, 95 U. S. 485; *Louisville, etc.; Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. Rep. 348; *Chesapeake, etc.; R. Co. v. Kentucky*, 179, U. S. 388, 21 Sup. Ct. Rep. 101.

The true test is not whether the State statute is enacted under the police power but whether the regulation of interstate commerce is direct or merely incidental so as to fall on one side or the other of the very hazy line of demarcation between the exclusive and the concurrent powers over interstate commerce. In order to sustain the State law as against the fourteenth amendment it must be under some recognized power of the State legislature. That power is frequently the police power which is subordinate to the power of congress over interstate commerce. As was said in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 6 Sup. Ct. Rep. 252, "Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise for any purpose whatever, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land." The true test, however, is not whether the State looked to the police power in its enactment but whether the State may act concerning

interstate commerce in the absence of federal regulation. If congress has acted on the subject under the interstate clause or if the court considers that the action of the State is a direct interference with interstate commerce, the State law under whatever power it may be enacted cannot affect it. "If a law passed by a State in the exercise of its acknowledged powers gets into conflict with that will (of congress) the courts and State cannot occupy the position of equally opposing sovereignties." *In re: Rahrer*, 140 U. S. 545, 555, 11 Sup. Ct. Rep. 865.

The failure to work out general principles of the subject or to show that such principles cannot be deduced from the decisions also affects the treatment of the division between the exclusive and concurrent powers of congress. It may be that the decisions are not such as to allow of the working out of any principles. A thorough treatment of the subject should, however, endeavor to see just where the cases lead us, but Mr. Calvert has contented himself with the vague statement found in *Cooley v. Board of Wardens*, 12 How. 299, 319, that "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress," a principle which, although repeated in some later cases, is vague and unsatisfactory, and leads nowhere. His treatment of this subject may be compared with that of James S. Rogers in *American Law Register*, vol. 53, pp. 529, 593.

Subject to the limitations above noted, the work is a thoroughly useful one and cannot be neglected by any student of the subject. The law of interstate commerce is constantly being developed by the courts and a thorough treatise of the subject would perhaps be impossible at the present time. It is to be hoped, however, that the decisions themselves will have more regard for the principles of the subject and that the way will be opened for a complete treatise upon interstate commerce.

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The Law of Railroad Regulation, with Special Reference to American Legislation. By JOSEPH HENRY BEALE, JR., and BRUCE WYMAN. (Boston: William J. Nagel. 1906. Pp. lii, 1285.)

The scope of this work can best be indicated by giving a brief summary of its contents. After a short introductory chapter which sketches in outline the development of the law of public employments or callings